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In the Supreme Court of the United States

OCTOBER TERM, 1977

HAROLD HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 568 F. 2d 1302.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1978. The petition for a writ of certiorari was filed on March 22, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner should have been allowed to withdraw his guilty plea after sentence because the trial judge had not expressly informed him during the Rule 11 proceeding of the possibility of consecutive sentencing.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Arizona to one count of conspiracy to import heroin (21 U.S.C. 963) and one count of conspiracy to possess heroin (21 U.S.C. 846). He was sentenced to 12 years' imprisonment, to be followed by 15 years' special parole, and a $25,000 fine on each count, the sentences to run consecutively. Thereafter he moved to set aside his guilty plea. The district court denied the motion, but it subsequently reduced the prison sentences to consecutive terms of ten years' imprisonment, followed by three years' special parole. The court of appeals affirmed (Pet. App. A).

On September 29, 1976, petitioner and his wife were accused in a four-count indictment of violations of the federal narcotics laws. On March 3, 1977, pursuant to a plea bargain whereby two of the counts against him would be dismissed, petitioner requested leave to plead guilty to the two remaining counts. At the outset of the proceeding required by Rule 11, Fed. R. Crim. P., petitioner was twice informed by government counsel that these charges carried "with them penalties of 15 years each," a possible fine of $25,000 and a minimum three-year special parole term as to each count. Petitioner responded that he was aware of these maximum penalties, that he desired to plead guilty, that his plea was voluntary, and that the only plea agreement concerned the dismissal of the other two counts (1 Tr. 3-4).[1] The district court then questioned petitioner and established that he was not under the influence of drugs, that he understood

[1] "1 Tr." refers to the transcript of the March 8, 1977, Rule 11 proceeding and the March 28, 1977, sentencing hearing. "2 Tr." refers to the transcript of the May 16, 1977, hearing on petitioner's motion to set aside his guilty plea.

the constitutional rights that he would waive by pleading guilty, that his guilty plea could result in a revocation of his probation, that he understood the possible penalties as outlined by the prosecutor, and that the government had made no promises in exchange for the plea other than those previously discussed (1 Tr. 5-8). The court outlined the nature of the charges, and petitioner explained his involvement in the heroin smuggling operation and confessed to his guilt (1 Tr. 8-9).

The district court concluded that petitioner's guilty plea was freely and voluntarily given and was supported by a factual basis. It therefore accepted the plea and referred the case to the probation office for a presentence report (1 Tr. 9-10). On March 28, 1977, after further questioning petitioner about the facts of the offense (1 Tr. 11-13), the court imposed consecutive sentences of 12 years' imprisonment, 15 years' special parole, and a fine of $25,000 on each of the two counts (1 Tr. 15-16).[2]

On April 6, 1977, petitioner moved to set aside his guilty plea, contending that it was based upon a representation that the maximum sentence he could receive was 12 years' imprisonment. Thereafter petitioner amended the motion, alleging in addition that he had not been advised that he could receive 15 years' imprisonment, a $25,000 fine, and a minimum three-year special parole term on each count and that he had been told that if he pleaded guilty his wife would receive probation. At the evidentiary hearing held on the motion, petitioner's attorney testified that he had advised petitioner that he risked additional punishment if he entered a guilty plea to two counts, but that the district judge rarely imposed

[2] Petitioner's wife then pleaded guilty to an accessory charge and was sentenced to five years' imprisonment (2 Tr. 58, 82).

consecutive sentences and that it was his guess that petitioner would be sentenced to 12 years' imprisonment (2 Tr. 34, 40-42, 48-49). The attorney denied that he had told petitioner that his wife would receive probation or that the government had offered to give her probation in exchange for petitioner's guilty plea (2 Tr. 29-30, 50). Petitioner testified that, based upon his previous experience with sentencing, he did not interpret the statement at the Rule 11 proceeding relating the maximum sentence on each count as indicating the possibility of consecutive sentencing (2 Tr. 66, 76-78, 84-85, 89). He maintained that his principal concern in pleading guilty was his wife and that his lawyer had stated that she would receive probation (2 Tr. 62, 64, 82, 88). Following the hearing, petitioner's motion was denied.

ARGUMENT

1. Petitioner contends (Pet. 7-8) that his guilty plea was invalid under Rule 11(c), Fed. R. Crim. P., because he had not been expressly informed of the possibility of consecutive sentences. But as the court of appeals concluded in an opinion upon which we basically rely, the Rule was satisfied when petitioner was told of the maximum possible penalty for *each* offense (1 Tr. 3-4).

The purpose of Rule 11 "is to assure defendants that they fully understand and can assess intelligently the risks attendant to pleading guilty prior to so doing." *United States* v. *Vermeulen*, 436 F. 2d 72, 75 (C.A. 2), certiorari denied, 402 U.S. 911. Before the 1975 amendments to the Federal Rules of Criminal Procedure, it was settled that this purpose was satisfied if the defendant was made aware of the maximum possible sentence on each count to which he offered to plead guilty, without any explicit admonition by the court that the sentences could be imposed consecutively. *United States* v. *Vermeulen*, *supra*, 436 F. 2d at 75; *Paradiso* v. *United States*, 482 F. 2d 409, 415 (C.A. 3); *Johnson* v. *United States*, 460 F. 2d

1203 (C.A. 9), certiorari denied, 409 U.S. 873; *Hinds* v. *United States*, 429 F. 2d 1322, 1328 (C.A. 9). Although Rule 11 was amended in 1975 to require that the defendant be informed of the "maximum possible penalty provided by law," it is significant that the Rule does not insist that he be informed of the maximum possible total sentence on all the charges to which the plea is offered, "including that possible from consecutive sentences," as does the American Bar Association, *Standards Relating to Pleas of Guilty*, § 1.4 (Approved Draft, 1968). Moreover, the history of the change, as the opinion below demonstrates, reaffirms that a defendant need only be specifically advised of the maximum possible sentence with respect to each offense (Pet. App. A-3 to A-5).

We recognize, as did the Third Circuit in *Paradiso* v. *United States*, *supra*, 482 F. 2d at 415, that it is preferable for district courts to state explicitly that the sentences can be consecutive, although such advice is not mandated by the Rule. Here, however, not only was petitioner informed at the Rule 11 proceeding that "each" of the two counts carried a maximum sentence of 15 years' imprisonment, but also he was represented by counsel who had discussed the possibility of consecutive sentences with him (although the attorney told petitioner that in his opinion the sentencing judge rarely "stacked" sentences) (2 Tr. 41-42).[3]

2. Relying on *McCarthy* v. *United States*, 394 U.S. 459, petitioner contends (Pet. 8-10) that the district court violated Rule 11(c) because it did not personally inform him of the maximum possible penalties but instead allowed the prosecutor to convey that information. This

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[3]It is also significant that petitioner does not claim that he would not have pleaded guilty if he had been expressly advised during the Rule 11 proceeding that the sentences could be imposed consecutively.

claim is incorrect. The record reflects that, although government counsel initially advised petitioner of the maximum penalties he could receive on each count, the court did participate by reminding counsel of the mandatory special parole term (1 Tr. 3). In addition, the court then proceeded to conduct an extensive inquiry into petitioner's understanding of his rights, which included questions regarding petitioner's awareness of the possible penalties as explained by the prosecutor (1 Tr. 7). This procedure fully complied with the Rule. As the court of appeals observed (Pet. App. A-6), "[r]equiring the court to inform a defendant of penalties does not necessarily mean that the words must literally issue from the judge's lips. * * * [A] reasonable interpretation of Rule 11 is that it means a judge must insure that the * * * defendant understands the possible sentences and that such understanding be apparent in the record." Accord, *United States* v. *Lambros*, 544 F. 2d 962, 965-966 (C.A. 8), certiorari denied, 430 U.S. 930.

Contrary to petitioner's assertion, the court of appeals' construction of Rule 11(c) does not conflict with *McCarthy* v. *United States, supra*. In that case the Court held that a defendant whose guilty plea had been accepted pursuant to a seriously defective Rule 11 proceeding must be permitted to withdraw his plea. The Court noted that "noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate * * * plea" (394 U.S. at 471-472), and it refused to assume from a silent record that the defendant had entered his plea " 'with a complete understanding of the charge against him' " (*id.* at 464).

McCarthy was therefore concerned with the necessity of requiring the defendant to respond personally and affirmatively to inquiries, so that a record would be created that would enable the trial judge "to ascertain the plea's voluntariness [and] * * * to support his determination in a subsequent post-conviction attack." *Id.* at 466.

See *Brady* v. *United States*, 397 U.S. 742, 748-749; *Boykin* v. *Alabama*, 395 U.S. 238, 243 and n. 5; *Halliday* v. *United States*, 394 U.S. 831, 832. However, the Court expressly declined to establish a litany for district courts to follow during a Rule 11 proceeding, recognizing that the nature of the inquiry must necessarily vary from case to case and that " '[m]atters of reality, and not mere ritual, should be controlling.' " *McCarthy* v. *United States, supra*, 394 U.S. at 467-468, n. 20, quoting from *Kennedy* v. *United States*, 397 F. 2d 16, 17 (C.A. 6).

Thus, "the error that was fatal in *McCarthy* was not that the court had not posed the relevant questions, but that the record did not show that they had been posed at all." *Davis* v. *United States*, 470 F. 2d 1128, 1131 (C.A. 3). Here, by contrast, the record of the guilty plea proceedings conclusively demonstrates that all the pertinent inquiries required by Rule 11 were made of petitioner. We submit that nothing in Rule 11 prohibits such questioning of a defendant by the prosecutor, either in whole or in part, in the presence of the defendant's counsel and the court. See *United States* v. *O'Donnell*, 539 F. 2d 1233 (C.A. 9), certiorari denied, 429 U.S. 960; *United States* v. *Yazbeck*, 524 F. 2d 641, 643 (C.A. 1); *Davis* v. *United States, supra*, 470 F. 2d at 1130-1132; *United States* v. *Benson*, 469 F. 2d 222 (C.A. 8). Although the Rule provides that "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform him of, and determine that he understands," the nature of the charge and the consequences of his plea, the crucial factor is not that the court itself ask the questions of the defendant, but that "the record leave no doubt that the defendant heard and understood what was said." *United States* v. *Yazbeck, supra*, 524 F. 2d at 643 and n. 1.

This position is supported by the Advisory Committee Notes to the 1966 amendment of Rule 11, when the Rule was revised to contain the provision requiring the court to address "the defendant personally." In discussing this amendment the Advisory Committee remarked:

> The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States* v. *Diggs,* 304 F. 2d 929 (6th Cir. 1962); *Domenica* v. *United States,* 292 F. 2d 483 (1st Cir. 1961); *Gundlach* v. *United States,* 262 F. 2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and *Julian* v. *United States,* 236 F. 2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with *Meeks* v. *United States,* 298 F. 2d 204 (5th Cir. 1962); *Nunley* v. *United States,* 294 F. 2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and *United States* v. *Von der Heide,* 169 F. Supp. 560 (D.D.C. 1959).

Rule 11, Advisory Committee's Note, Proposed Rules of Criminal Procedure, 39 F.R.D. 171.

The revision thus was designed to eliminate the practice of accepting guilty pleas in reliance upon assurances by the defendant's counsel or on other assumptions not appearing in the record, rather than to mandate that the defendant be questioned only by the court. *Phillips* v. *United States,* 519 F. 2d 483, 485 (C.A. 6); *Otero-Rivera* v. *United States,* 494 F. 2d 900, 903-904 (C.A. 1). See *Davis* v. *United States, supra,* 470 F. 2d at 1130-1131:

> The word "personally" in the amendment to the rule follows and therefore would appear to modify "defendant," not "court." The change was aimed at

> preventing a reliance by the court upon a statement or response of the defense attorney rather than the defendant himself to establish voluntariness and understanding of the charge and consequences of the plea. There is no indication that permitting counsel for either the Government or the defendant to address appropriate questions to the defendant was an evil at which the amendment was aimed, and we do not perceive evil in such procedures.* * *

Cf. 8 Moore's *Federal Practice,* para. 11.02[1], p. 11-23 (1977) ("The method by which a defendant may be advised of the charge may vary from case to case depending on the complexity of the action and the individual defendant").[4]

As petitioner notes (Pet. 8), the Fifth Circuit has reached a contrary result in a number of cases, a result that, for reasons we have already stated, we believe to be premised on an unnecessarily technical reading of Rule 11 that is supported neither by *McCarthy* v. *United States, supra,* nor by the history of the Rule. In any event, we do not believe that it is necessary for this Court to resolve the conflict at this time. Not only does the Fifth Circuit stand alone in insisting that the district court itself conduct the entire interrogation of a defendant prior to accepting his guilty plea, but also the issue, which has arisen only infrequently, does not appear to be sufficiently important to the administration of the criminal laws to require

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[4]Nothing in the 1975 amendments to Rule 11 suggests that a change in this settled interpretation was intended. To the contrary, the Advisory Committee Notes to the 1975 amendments state that "[s]ubdivision (c) *retains* the requirement that the court address the defendant personally" (emphasis added) (62 F.R.D. 278).

further review.[5] Moreover, the issue concerns an area of practice in which complete uniformity among the circuits does not appear to be essential.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Even assuming that Rule 11 imposes a non-delegable duty on the district court to interrogate the defendant prior to accepting a guilty plea, the Fifth Circuit has failed to consider whether the violation of this requirement may have been harmless. See Fed. R. Crim. P. 52(a); *United States* v. *Scharf*, 551 F. 2d 1124, 1130 (C.A. 8), certiorari denied, No. 76-1611, October 3, 1977.

[6]In other areas involving the acceptance of guilty pleas the Fifth Circuit similarly has imposed more rigorous requirements than other courts of appeals. For example, the court has required that the defendant be questioned under oath during the Rule 11 proceeding. See *Bryan* v. *United States*, 492 F. 2d 775, 781 (C.A. 5), certiorari denied, 419 U.S. 1079.

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